

16D C.J.S. Constitutional Law VIII XXII A Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

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A. Armed Services

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16D C.J.S. Constitutional Law § 2026

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2026. Due process in the military, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4242

Congress is subject to the limitations of the Due Process Clause when acting in the area of military affairs, but the tests and limitations to be applied may differ because of the military context.

Congress is subject to the limitations of the Due Process Clause when legislating in the area of military affairs,¹ but the tests and limitations to be applied may differ because of the military context.² An individual does not cease to be a person within the protection of the Fifth Amendment³ because he or she has joined the nation's armed forces and has taken the oath to support the Federal Constitution with his or her life if need be.⁴ The guaranty of due process in the Fifth Amendment makes no exception in the case of such persons⁵ although even where a person within the military enjoys the protection of due process, he or she is not necessarily entitled to the same standard of fundamental fairness as civilians.⁶ Servicemembers do not enjoy due process protections above and beyond the panoply of rights provided to them by plain text of the Constitution, the Uniform Code of Military Justice, and the Manual for Courts-Martial.⁷

In general, courts tread lightly on the military domain, with scrupulous regard for the power and authority of the military establishment to govern its own affairs within the broad confines of constitutional due process.⁸ Generally, the armed services are required, under minimum due process standards, to give notice of proceedings affecting military personnel,⁹ although, in some instances, the failure to give notice and hold a hearing before various determinations involving military personnel are made does not deny due process,¹⁰ and, in the absence of the deprivation of some entitlement or significant right, the due process protections are not operative.¹¹ The failure of the military to follow its own regulations may, however, constitute a deprivation of due process¹² though not every failure of the military to follow its own regulations is a per se due process violation; rather, only those that implicate a protected liberty or property interest are.¹³

To pass muster on the due process challenge of "void for vagueness," it is not required that military regulations possess the same precision and specificity of standards as required of criminal statutes.¹⁴

Promotion.

There exists no property or liberty interest protected by due process in a military promotion per se.¹⁵ Navy directive regarding the translation of trait averages into promotion recommendations was insufficiently mandatory to give active duty naval officer a claim of entitlement to promotion protected by the Due Process Clause.¹⁶

Change of status.

A status review hearing must comply with the due process standards.¹⁷

Deprivation of medical care.

A claim by a person in military service that he or she is unconstitutionally deprived of medical care is cognizable through the Due Process Clause.¹⁸

Restricting access to military installations and facilities.

The commanding officer of a military installation has the right to summarily exclude civilians from the installation without violating the requirements of the Due Process Clause.¹⁹ Even if a civilian has no constitutional right to be in a military establishment in the first place, however, such person cannot be deprived of liberty or property in violation of the Due Process Clause by the withdrawal of the permission for such person to enter the establishment.²⁰

Privileges and immunities.

The Due Process Clause of the Fifth Amendment does not prohibit American officials from exercising historical immunities of military forces in refusing to consent to the jurisdiction of a foreign administrative court.²¹

Re-enlistment.

The due process provision of the Fifth Amendment does not provide substantive protection for reenlistment in the military.²²

Civil relief.

Officers who deprive an officer of liberty without due process are subject to a damage action under the Fifth Amendment.²³

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Footnotes

- 1 U.S.—[Witt v. Department of Air Force](#), 527 F.3d 806 (9th Cir. 2008); [Sanford v. U.S.](#), 567 F. Supp. 2d 114 (D.C. 2008), aff'd, 586 F.3d 28 (D.C. Cir. 2009).
- 2 U.S.—[Rostker v. Goldberg](#), 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981).
- 3 U.S. Const. Amend. V.
- 4 U.S.—[U. S. ex rel. Innes v. Hiatt](#), 141 F.2d 664 (C.C.A. 3d Cir. 1944).
Protected right
U.S.—[Suro v. Llenza](#), 531 F. Supp. 1094 (D.P.R. 1982).
- 5 U.S.—[U.S. v. Miller](#), 261 F. Supp. 442 (D. Del. 1966).
Arbitrary curtailment of rights of certain persons
U.S.—[Etheridge v. Schlesinger](#), 362 F. Supp. 198 (E.D. Va. 1973).
- 6 U.S.—[Vance v. U.S.](#), 434 F. Supp. 826 (N.D. Tex. 1977), aff'd, 565 F.2d 1214 (5th Cir. 1977).
Rationale
Lesser degree of due process afforded to members of military is not based on an ongoing war or needs of a drafted army but rather develops from view that courts are not equipped to determine specific procedures proper to decision making of military.
U.S.—[Sullivan v. Mann](#), 431 F. Supp. 695 (M.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir. 1978).
- 7 U.S.—[U.S. v. Vazquez](#), 72 M.J. 13 (C.A.A.F. 2013).
- 8 U.S.—[Spadone v. McHugh](#), 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).
- 9 U.S.—[Phillips v. U.S.](#), 910 F. Supp. 101 (E.D. N.Y. 1996); [McDonald v. McLucas](#), 371 F. Supp. 831 (S.D. N.Y. 1974), judgment aff'd, 419 U.S. 987, 95 S. Ct. 297, 42 L. Ed. 2d 261 (1974).
- 10 U.S.—[Committee for GI Rights v. Callaway](#), 518 F.2d 466 (D.C. Cir. 1975).
Distribution of publications on military post
U.S.—[Schneider v. Laird](#), 453 F.2d 345 (10th Cir. 1972).
Clemency proceedings
U.S.—[Vincent v. Schlesinger](#), 388 F. Supp. 370 (D.D.C. 1975).
- 11 U.S.—[Charlton v. Donley](#), 846 F. Supp. 2d 76 (D.D.C. 2012); [Parrish v. Brownlee](#), 335 F. Supp. 2d 661 (E.D. N.C. 2004).
- 12 U.S.—[Brown v. McHugh](#), 972 F. Supp. 2d 58 (D.D.C. 2013) (retired officer's claim that an adverse Officer Evaluation Report in his service record essentially ended his career and forced him to retire did not set forth a property interest that triggered constitutional due process protections).
- 13 U.S.—[U.S. v. Floyd](#), 477 F.2d 217 (10th Cir. 1973).
- 14 U.S.—[Roberts v. U.S.](#), 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).
- 15 U.S.—[Roberts v. U.S.](#), 883 F. Supp. 2d 56 (D.D.C. 2012), judgment aff'd, 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).
"Missing in action" changed to "deceased" or "killed in action"
U.S.—[Darr v. Carter](#), 487 F. Supp. 526 (E.D. Ark. 1980), judgment aff'd, 640 F.2d 163 (8th Cir. 1981).
- 16 U.S.—[Cushing v. Tetter](#), 478 F. Supp. 960 (D.R.I. 1979).
- 17 U.S.—[Government of Canal Zone v. Brooks](#), 427 F.2d 346 (5th Cir. 1970).
No due process requirement to afford hearing at or before time barred
U.S.—[U.S. v. Albertini](#), 783 F.2d 1484 (9th Cir. 1986).
- 18 U.S.—[Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy](#), 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).
- 19 U.S.—[Dostal v. Haig](#), 652 F.2d 173 (D.C. Cir. 1981).
- 20 U.S.—[Williams v. U.S.](#), 541 F. Supp. 1187, 64 A.L.R. Fed. 479 (E.D. N.C. 1982).

No property interest in reenlistment

U.S.—[Mangino v. Department of Army](#), 818 F. Supp. 1432 (D. Kan. 1993), aff'd, 17 F.3d 1437 (10th Cir. 1994).

A.L.R. Library

Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

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Hospitalization without hearing

U.S.—[Alvarez v. Wilson](#), 431 F. Supp. 136 (N.D. Ill. 1977).

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16D C.J.S. Constitutional Law § 2027

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2027. Service academies and cadets

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4247

The service academies are subject to the Fifth Amendment, and cadets must be accorded due process before separation.

The service academies are subject to the Fifth Amendment,¹ and cadets must be accorded due process before separation.² It is not, however, required that procedural due process be afforded at every stage of developing disciplinary action.³ Thus, due process safeguards do not apply at the honor committee level with respect to the military academy honor code and system since such committee decisions have no effect other than to initiate de novo proceedings before a board of officers.⁴ What is required is that an adequate hearing be held before the final act of disenrollment.⁵ Accordingly, before a cadet can properly be dismissed or separated from his or her service academy, the cadet must be given a full and fair hearing, notice of the specific charges against him or her, and fair opportunity to appear, to present his or her defense, and to present statements, evidence, and witnesses on his or her behalf.⁶ Though a cadet facing a disciplinary sanction of disenrollment has a due process right to the presence of counsel at a disciplinary hearing, such counsel can only advise and consult but cannot actively participate in the hearing.⁷ However, it has also been held that a cadet's inability to receive legal counsel prior to and during an honor board proceeding and honor board's refusal to provide him with his own expert witness does not violate due process, absent a

regulation requiring board to provide cadet with legal counsel or with expert witness.⁸ A military proceeding conducted within these bounds of procedural due process is proper and immune from constitutional infirmity.⁹

Propriety of expulsion as sole remedy.

The sole penalty of expulsion from an academy for a violation of the cadet honor code is, while severe, reasonable and not violative of due process.¹⁰

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Footnotes

1 U.S. Const. Amend. V.

2 U.S.—[Andrews v. Knowlton](#), 509 F.2d 898 (2d Cir. 1975).

Degree of due process

U.S.—[Love v. Hidalgo](#), 508 F. Supp. 177 (D. Md. 1981).

3 U.S.—[Birdwell v. Schlesinger](#), 403 F. Supp. 710 (D. Colo. 1975).

4 U.S.—[Andrews v. Knowlton](#), 509 F.2d 898 (2d Cir. 1975).

5 U.S.—[Phillips v. U.S.](#), 910 F. Supp. 101 (E.D. N.Y. 1996).

Academy subject to requirements of due process in disciplining cadets

U.S.—[Tully v. Orr](#), 608 F. Supp. 1222, 25 Ed. Law Rep. 269 (E.D. N.Y. 1985).

6 U.S.—[Crowley v. U.S. Merchant Marine Academy](#), 985 F. Supp. 292 (E.D. N.Y. 1997).

Due process established

Where the record shows that the cadet received notice that he was deemed to have failed the Honors Mentorship Program, and that the cadet used his opportunity to present a defense before he was disenrolled, due process is not denied

U.S.—[Spadone v. McHugh](#), 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).

Presumption of correctness of delinquency reports

U.S.—[Brown v. Knowlton](#), 370 F. Supp. 1119 (S.D. N.Y. 1974), aff'd, 505 F.2d 727 (2d Cir. 1974).

7 U.S.—[Crowley v. U.S. Merchant Marine Academy](#), 985 F. Supp. 292 (E.D. N.Y. 1997).

8 U.S.—[Charlton v. Donley](#), 846 F. Supp. 2d 76 (D.D.C. 2012).

9 U.S.—[Andrews v. Knowlton](#), 509 F.2d 898 (2d Cir. 1975).

10 U.S.—[Andrews v. Knowlton](#), 509 F.2d 898 (2d Cir. 1975).

16D C.J.S. Constitutional Law § 2028

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2028. Appearance and uniform of military personnel

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4242

Regulations relating to the appearance of military personnel must comply with the requirements of due process.

Regulations relating to the appearance of military personnel must comply with the requirements of the Due Process Clause.¹ Military regulations requiring members of the ready reserve to present a neat and soldierly appearance are not so vague and uncertain as to amount to a denial of due process of law.² Nothing in the Due Process Clause, however, mandates the adoption of a unisex grooming code by the armed services.³ Additionally, while regulations with respect to the wearing of wigs by the military may deny due process of law,⁴ various other regulations, such as those relating to the permissible length of hair,⁵ do not deny due process of law.

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Footnotes

- ¹ U.S.—[Brown v. Schlesinger](#), 365 F. Supp. 1204 (E.D. Va. 1973).
Separation for violation servicemember not notified of

U.S.—[Crane v. Secretary of Army](#), 92 F. Supp. 2d 155 (W.D. N.Y. 2000).

2 U.S.—[Anderson v. Laird](#), 437 F.2d 912 (7th Cir. 1971).

3 U.S.—[Gadberry v. Schlesinger](#), 419 F. Supp. 949 (E.D. Va. 1976), aff'd, 562 F.2d 46 (4th Cir. 1977).

4 U.S.—[Brown v. Schlesinger](#), 365 F. Supp. 1204 (E.D. Va. 1973).

5 **Interference with profession as actor**

U.S.—[Agrati v. Laird](#), 440 F.2d 683 (9th Cir. 1971).

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16D C.J.S. Constitutional Law § 2029

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2029. Civilian military employees

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4242

In order to invoke constitutional due process protections with respect to a pretermination hearing, a civilian employee of a military department must have a sufficient liberty or property interest in the employment.

In order to invoke constitutional due process protections with respect to a hearing prior to the dismissal of a civilian employee of a military department, the employee must have a sufficient liberty or property interest in the employment.¹ A procedure followed in discharging a civilian employee comports with due process requirements where the employee is given notice of the charges, an opportunity to respond to such charges, and an evidentiary hearing even though the hearing is held after the termination of employment.² Where the dismissal of a civilian employee calls into question the employee's good name and integrity, due process entitles the employee to an opportunity to clear his or her name through a posttermination trial-type hearing.³

Failure to give a civilian employee advance notice of all the charges brought against him or her is a denial of such employee's due process right to a decision in compliance with statutory and regulatory procedures.⁴ Additionally, a civilian employee is entitled to a hearing before an impartial hearing officer on appeal of his or her termination since the commanding officer who discharged such civilian cannot decide such appeal consistent with the requirements of due process.⁵

Debarring employee from entering military base.

A former civilian military base employee who was debarred from the base had no Fifth Amendment right to notice and a hearing before being debarred nor had a liberty interest requiring due process protection.⁶

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Footnotes

- 1 U.S.—[Elkin v. Roudebush](#), 564 F.2d 810 (8th Cir. 1977).
Probationary employee
U.S.—[Curtin v. Henderson](#), 514 F. Supp. 16 (E.D. N.Y. 1980).
- 2 U.S.—[Davis v. Vandiver](#), 494 F.2d 830 (5th Cir. 1974).
- 3 U.S.—[Rolles v. Civil Service Commission](#), 512 F.2d 1319 (D.C. Cir. 1975).
- 4 U.S.—[Albert v. Chafee](#), 571 F.2d 1063 (9th Cir. 1977).
- 5 U.S.—[Baye v. Wade](#), 416 F. Supp. 1147 (E.D. La. 1976).
- 6 U.S.—[Serrano Medina v. U.S.](#), 709 F.2d 104, 36 Fed. R. Serv. 2d 554 (1st Cir. 1983).

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16D C.J.S. Constitutional Law § 2030

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2030. Pay, allowances, and family benefits of military personnel

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4244

The pay and allowances of military personnel must be made in a manner which is not violative of due process.

Statutes providing aid or relief to families and dependents of military personnel must comply with the due process requirements.¹ Statutes dealing with retirement pay must similarly comply with due process² though military retirement pay can be prospectively altered without offending due process.³ However, an Army major facing involuntary separation has no constitutionally-protected property interest in continued military service or employment benefits that came with military service, precluding her due process claims.⁴

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Footnotes

¹

Medical benefits

Statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining medical and dental benefits but that spouses of female

members are not dependents unless they are, in fact, dependent for over one-half of their support violates the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

U.S.—[Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 \(1973\)](#).

Different dependency criteria

A statutory provision establishing, with respect to allowances, different dependency criteria for spouses of male and female military personnel, solely for administrative convenience, violates the Due Process Clause of the Fifth Amendment insofar as it requires a female to prove the dependency of her husband while not requiring such proof with respect to the spouse of a male.

U.S.—[Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 \(1973\)](#).

Missing status

Next of kin of American service personnel carried on missing status while on active duty have constitutionally protectible property interests at stake in continuation of entitlements granted to them under statutes relating to payments to missing persons.

U.S.—[McDonald v. McLucas, 371 F. Supp. 831 \(S.D. N.Y. 1974\)](#), judgment aff'd, [419 U.S. 987, 95 S. Ct. 297, 42 L. Ed. 2d 261 \(1974\)](#).

2

U.S.—[Puglisi v. U. S., 215 Ct. Cl. 86, 564 F.2d 403 \(1977\)](#).

3

U.S.—[Schrader v. U.S., 20 Cl. Ct. 161, 1990 WL 48681 \(1990\)](#).

4

U.S.—[Smith v. Harvey, 541 F. Supp. 2d 8 \(D.D.C. 2008\)](#).

16D C.J.S. Constitutional Law § 2031

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XXII. Particular Applications of Due Process Guaranty

A. Armed Services

1. In General

§ 2031. Veterans' benefits

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4244

The regulation of veterans' benefits must generally comply with the requirements of due process.

The regulation of veterans' benefits,¹ and pension benefits of surviving spouses of veterans,² as well as proceedings in which Veterans Affairs decides whether claimants are eligible for veterans' benefits,³ must generally comply with the requirements of due process, though a veteran's pension benefit is not such a fundamental right that it requires special constitutional protection for due process purposes.⁴ Statutes dealing with educational assistance allowance to eligible veterans must, therefore, generally comply with the requirements of due process⁵ though the Due Process Clause of the Fifth Amendment⁶ does not prohibit Congress from restricting the educational courses for which veterans' benefits are available without including identical course limitations in other federal educational assistance programs.⁷ Additionally, the exclusion of conscientious objectors who perform alternative civilian service from the educational assistance program under a veterans' benefit statute is not violative of due process on the ground that it is a vindictive and harsh policy which has the purpose to punish conscientious objectors.⁸

A veteran has a constitutionally protected property interest in entitlement to veterans disability benefits,⁹ but a protectable property interest in such disability benefits extends only so far as the law creates it.¹⁰ While veterans and veterans' surviving spouses are generally entitled, pursuant to the Due Process Clause, to notice and a pretermination hearing before benefits may be terminated or reduced,¹¹ veterans do not have a protected property or liberty interest in a future award of disability benefits,¹² and thus, the delay of the Department of Veterans' Affairs' in processing a veteran's claims for disability benefits does not violate such veteran's due process rights.¹³ Additionally, a former armed services member who might qualify for potential future veterans' benefits does not have a due process property interest in the expectation of those benefits.¹⁴

Nonadversarial procedures at the Department of Veterans Affairs Regional Office level for adjudicating veterans' disability claims are sufficient to satisfy due process because subpoena power, discovery, predecision hearings, and the presence of paid attorneys would transform the VA's system of benefits administration into an adversarial system that would tend to reflect the rigorous system of civil litigation that Congress plainly intended to preclude.¹⁵

The due process right to the effective assistance of counsel does not apply to proceedings before the Court of Appeals for Veterans Claims.¹⁶

A veterans' benefits statute, which imposes a limit on attorney's fees for attorneys representing veterans under laws administered by the Department of Veterans' Affairs, does not deny due process.¹⁷ Additionally, due process does not entitle a veteran to notice from the Board of Veterans Appeals of the right to appeal to the Court of Veterans Appeals.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Board of Veterans' Appeal did not deny due process to veteran in its denial of veteran's request for earlier effective dates for service-related conditions; veteran's claim that Board withheld probative medical documents was unsupported by record and veteran conceded that most of documents listed in motion were not relevant to issues on appeal, veteran failed to identify any missing relevant documents that Board failed to consider, and record showed that Department of Veterans Affairs made efforts to provide veteran with documents he sought. [U.S. Const. Amend. 5. Bray v. Wilkie, 839 Fed. Appx. 446 \(Fed. Cir. 2020\)](#).

Blind war veteran was not given opportunity for meaningful hearing before his Federal Employees Retirement Systems (FERS) disability benefits were terminated by Office of Personnel Management (OPM), as required by Fifth Amendment Due Process clause, where veteran was informed by government that his request for reconsideration of cancellation of benefits would be denied even before OPM considered it. [U. S. Const. Amend. 5. Minney v. United States Office of Personnel Management, 130 F. Supp. 3d 225 \(D.D.C. 2015\)](#).

[END OF SUPPLEMENT]

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Footnotes

1

Statutory destruction of withheld benefits

U.S.—[de Rodulfa v. U.S., 461 F.2d 1240, 18 A.L.R. Fed. 890 \(D.C. Cir. 1972\)](#).

2

U.S.—[Plato v. Roudebush, 397 F. Supp. 1295 \(D. Md. 1975\)](#).

3

U.S.—[Sprinkle v. Shinseki, 733 F.3d 1180 \(Fed. Cir. 2013\)](#), cert. denied, [134 S. Ct. 2834, 189 L. Ed. 2d 786 \(2014\)](#).

- 4 U.S.—[Latham v. Brown](#), 11 F.3d 1070 (Fed. Cir. 1993).
- 5 **A.L.R. Library**
- Deprivation of Due Process in Connection with Veteran's Right to Disability, Medical, or Mental Health Benefits, Treatment, or Services, 83 A.L.R. Fed. 2d 133.
- 5 **Property right**
- U.S.—[Devine v. Cleland](#), 616 F.2d 1080 (9th Cir. 1980).
- 6 **Hearing on educational assistance as satisfying due process**
- U.S.—[Celano v. Shinseki](#), 350 Fed. Appx. 442 (Fed. Cir. 2009).
- 7 **U.S. Const. Amend. V.**
- 8 U.S.—[Cleland v. National College of Business](#), 435 U.S. 213, 98 S. Ct. 1024, 55 L. Ed. 2d 225 (1978).
- 9 U.S.—[Johnson v. Robison](#), 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974).
- U.S.—[Cleannan v. Shinseki](#), 26 Vet. App. 144 (2013).
- 10 **Veterans' benefits are a protected property interest under the Fifth Amendment**
- U.S.—[Guillory v. Shinseki](#), 603 F.3d 981 (Fed. Cir. 2010)
- 11 U.S.—[Morris v. Shinseki](#), 26 Vet. App. 494 (2014).
- 12 U.S.—[Plato v. Roudebush](#), 397 F. Supp. 1295 (D. Md. 1975).
- 13 U.S.—[Jaskot v. Principi](#), 58 Fed. Appx. 839 (Fed. Cir. 2002).
- 14 U.S.—[Woznick v. Shinseki](#), 492 Fed. Appx. 100 (Fed. Cir. 2012); [Jaskot v. Principi](#), 58 Fed. Appx. 839 (Fed. Cir. 2002).
- 15 U.S.—[Rudo v. McHugh](#), 931 F. Supp. 2d 132 (D.D.C. 2013).
- 16 U.S.—[Veterans for Common Sense v. Shinseki](#), 678 F.3d 1013, 83 A.L.R. Fed. 2d 537 (9th Cir. 2012), cert. denied, 133 S. Ct. 840, 184 L. Ed. 2d 653 (2013).
- 17 U.S.—[Pitts v. Shinseki](#), 700 F.3d 1279 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 2856, 186 L. Ed. 2d 910 (2013).
- 18 U.S.—[Dyer v. Walters](#), 646 F. Supp. 791 (E.D. Mo. 1986).
- U.S.—[Machado v. Derwinski](#), 928 F.2d 389 (Fed. Cir. 1991) (overruled on other grounds by, [Bailey v. West](#), 160 F.3d 1360 (Fed. Cir. 1998)).

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16D C.J.S. Constitutional Law § 2032

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

2. Active or Reserve Duty

§ 2032. Due process rights of active servicemembers and reservists

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4242, 4248

Reservists, who have voluntarily subjected themselves to the jurisdiction of the military by enlisting, are in a class distinct from inducted servicemembers with respect to due process rights.

While reservists, who have voluntarily subjected themselves to the jurisdiction of the military by enlisting, are in a class distinct from inducted servicemembers with respect to due process rights,¹ the failure of the reserve to follow its own regulations generally constitutes a deprivation of due process.² Where, however, the military does not violate its own regulations by maintaining an officer's status as a reservist prior to the order calling him or her to active duty, such officer is not deprived of a protectable liberty interest, for purposes of due process, when called to active duty in time of national emergency.³

Where a reservist's application for exemption is on the basis of community essentiality and hardship, the military review of such application must comport with procedural due process standards.⁴ It is not necessary, in such instance, that there be a full-blown adversary hearing.⁵ The military is not, however, required to delineate substantive guidelines as to the basis upon which

it will grant delays or exemptions from the obligation for reserve officers to report for active duty.⁶ Thus, a reserve officer is not deprived of due process because of the failure to promulgate such guidelines.⁷

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Footnotes

- 1 U.S.—[Rohe v. Froehlke](#), 368 F. Supp. 114 (E.D. N.Y. 1973), judgment rev'd on other grounds, [500 F.2d 113](#) (2d Cir. 1974).
- 2 U.S.—[Myers v. Parkinson](#), 398 F. Supp. 727 (E.D. Wis. 1975).
- 3 **Failure of reservist to resign commission upon completion of obligation**
- U.S.—[Parrish v. Brownlee](#), 335 F. Supp. 2d 661 (E.D. N.C. 2004).
- 4 U.S.—[Miller v. Claytor](#), 466 F. Supp. 938 (N.D. Cal. 1979).
- 5 U.S.—[Miller v. Claytor](#), 466 F. Supp. 938 (N.D. Cal. 1979).
- 6 U.S.—[Miller v. Claytor](#), 466 F. Supp. 938 (N.D. Cal. 1979).
- As to the application of due process to deferments and exemptions from military service, generally, see §§ [2034](#) to [2036](#).
- 7 U.S.—[Miller v. Claytor](#), 466 F. Supp. 938 (N.D. Cal. 1979).

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16D C.J.S. Constitutional Law § 2033

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

2. Active or Reserve Duty

§ 2033. Activation of member of reserves for unsatisfactory participation

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4242, 4248

The military regulations governing involuntary activation of a member of the ready reserve must provide procedural safeguards required by due process.

The military regulations governing involuntary activation of a member of the ready reserve provide procedural safeguards required by due process where the procedure permits a reservist to take the matter up with his or her unit commander and also permits an appeal in which the reservist has an opportunity to explain the facts pertinent to his or her case which the reservist feels were not fully considered.¹ Pursuant to such procedure, there is no due process right to a full adversary hearing prior to the administrative activation of a reservist.²

The military must follow its own regulations governing the procedural requirements pertaining to notification of unsatisfactory performance in reserve training programs, and the military's failure to provide a reservist with proper notification of unsatisfactory performance before involuntarily activating him or her is a violation of due process.³ Additionally, where regulations provide that a reservist can be excused from a drill under certain circumstances and that, prior to the activation of reservists for unsatisfactory participation, the commandant must have a statement from the reservist justifying, explaining, or

mitigating the charge, failure to afford the reservist an opportunity to present such a statement to a higher military authority constitutes a prejudicial violation of the regulations and thereby deprives the reservist of due process.⁴ The fact that the period of active duty to which a reservist is ordered because of the excessive number of absences from mandatory drills extends beyond the termination of his or her period of enlistment does not violate his or her Fifth Amendment⁵ rights.⁶

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Footnotes

- 1 U.S.—[Peters v. Secretary of Army](#), 448 F. Supp. 254 (E.D. Wis. 1978).
Determination of due process
U.S.—[Antonuk v. U.S.](#), 445 F.2d 592 (6th Cir. 1971).
Matter submitted beyond time limit for appeal
U.S.—[Keister v. Resor](#), 343 F. Supp. 203 (E.D. Pa. 1971), order aff'd, 462 F.2d 471 (3d Cir. 1972).
2 U.S.—[Sullivan v. Mann](#), 431 F. Supp. 695 (M.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir. 1978).
3 U.S.—[Febus Nevarez v. Schlesinger](#), 440 F. Supp. 741 (D.P.R. 1977).
4 U.S.—[Dellaverson v. Laird](#), 351 F. Supp. 134 (S.D. Cal. 1972).
5 U.S. Const. Amend. V.
6 U.S.—[Karpinski v. Resor](#), 419 F.2d 531 (3d Cir. 1969).
A.L.R. Library
Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.

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16D C.J.S. Constitutional Law § 2034

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2034. Due process in administration of military deferments and exemptions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Due process requires that, once Congress has granted exemptions from military duty, any conditions imposed on such exemptions be reasonable.

Due process requires that, once the Congress has granted exemptions from military duty, any conditions imposed on such exemptions be reasonable.¹ A registrant who seeks an exemption from military duty on the basis that he or she is being detained on a criminal charge and is, therefore, entitled to a classification based on moral standards, standards which, in the end result, benefit the community, is not denied due process in the refusal of such classification.² Even where a local draft board fails to follow selective service regulations in handling a registrant's claim for deferment, if the claim is frivolous and there is an absence of prejudice resulting from the procedures followed, there is no denial of due process.³

Failure of a draft board to consider a registrant's request for a deferment constitutes a denial of due process.⁴ The denial of a deferment to which a registrant is entitled also violates the registrant's right to due process.⁵ Due process does not require that a local board warn a registrant that he or she bears the burden of substantiating his or her claim to an exemption.⁶

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Footnotes

- 1 U.S.—[U.S. v. Thorn](#), 317 F. Supp. 389 (E.D. La. 1970).
- 2 U.S.—[U.S. v. Holohan](#), 390 F. Supp. 310 (S.D. N.Y. 1975).
- 3 U.S.—[U.S. v. Hahn](#), 381 F. Supp. 1311 (E.D. Mich. 1974).
- 4 U.S.—[U.S. v. Raymond](#), 352 F. Supp. 1220 (E.D. Wis. 1973).
- 5 U.S.—[Walsh v. Local Bd. No. 10, Mount Vernon, N. Y.](#), 305 F. Supp. 1274 (S.D. N.Y. 1969) (disapproved of on other grounds by, [U.S. v. Cook](#), 505 F.2d 1124 (2d Cir. 1974)).
- 6 U.S.—[U.S. v. Brooks](#), 422 F.2d 365 (5th Cir. 1970).

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16D C.J.S. Constitutional Law § 2035

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2035. Due process rights of conscientious objectors

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Due process requires that a registrant seeking a forum in which to assert its conscientious objection claim be given reasonable guidance with which to identify that forum.

Due process requires that a registrant seeking a forum in which to assert its conscientious objection claim be given reasonable guidance with which to identify that forum.¹ Thus, where a registrant makes it known to its local draft board the desire to claim conscientious objector status, it is a denial of due process for the board to fail to provide the registrant the means to adequately present the claim.² The failure of a draft board to consider a claim of conscientious objection is not, however, a denial of due process where the registrant fails properly to notify the board of his or her claim,³ but due process is denied if a timely filed conscientious objector claim is not considered at all by a local board.⁴

A registrant who is refused an opportunity to file a conscientious objector form is similarly denied due process.⁵ A draft board is not, however, required to send a registrant a form for conscientious objection unless the registrant requests one though the board's failure to do so is not a denial of due process.⁶ A registrant who is furnished with a conscientious objector form and is informed

that the local board will answer any questions involving it but fails to file such form cannot claim that he or she has been denied due process in an administrative proceedings.⁷ Where a local draft board finds that defendant's claim for conscientious objector classification is not sincere, and sets forth a rational basis, grounded upon the record and defendant's appearance at an interview, sufficient to provide the basis for a meaningful administrative and judicial review, the requirements of due process are satisfied.⁸

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Footnotes

- 1 U.S.—[U.S. v. Shockley](#), 492 F.2d 353 (9th Cir. 1974).
- 2 U.S.—[Bucher v. Selective Service System, Local Boards Nos. 2, etc.](#), 421 F.2d 24 (3d Cir. 1970).
- 3 U.S.—[U.S. v. McKinney](#), 427 F.2d 449 (6th Cir. 1970).
- 4 U.S.—[U.S. v. Weaver](#), 336 F. Supp. 558 (E.D. Pa. 1972).
- 5 U.S.—[U.S. v. Moyer](#), 307 F. Supp. 613 (S.D. N.Y. 1969).
- 6 U.S.—[U.S. v. Wendt](#), 452 F.2d 679 (9th Cir. 1971).
- 7 U.S.—[U.S. v. Kircher](#), 443 F.2d 46 (9th Cir. 1971).
- 8 U.S.—[U.S. v. Aull](#), 341 F. Supp. 389 (S.D. N.Y. 1972), judgment aff'd, [469 F.2d 151](#) (2d Cir. 1972).

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16D C.J.S. Constitutional Law § 2036

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

3. Deferments and Exemptions from Service

§ 2036. Due process rights of conscientious objectors—Civilian work

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Conscription of conscientious objectors for work of national importance without compensation, pursuant to a statute exempting conscientious objectors from military service, does not constitute a denial of due process.

Conscription of conscientious objectors for work of national importance without compensation, pursuant to a statute exempting conscientious objectors from military service, does not constitute a denial of due process.¹ Registrants classified conscientious objectors available for civilian work who do not report for physical examination and who do not explain to their local draft board the reason for their nonappearance cannot complain that they have been denied due process because they are ordered to report for civilian work without being given an armed forces physical examination.²

Well-defined administrative rules and regulations, articulating standards of required performance and providing for appropriate notice of violations of such standards, must be adopted before a registrant may properly be prosecuted for failure to perform civilian service properly.³ Due process, therefore, requires that a registrant have the opportunity to know the charges and claims made against him or her and be afforded the opportunity to rebut them.⁴ Due process is not denied where the draft board follows its procedures⁵ and is guided by an approved list of acceptable civilian employment.⁶ There is no provision in the selective

service regulations providing for the transfer of a registrant's work assignment hearing to a more convenient board, and a board's refusal to transfer such hearing is not a denial of due process.⁷

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Footnotes

- 1 U.S.—[U.S. v. Harris](#), 446 F.2d 129 (7th Cir. 1971).
- 2 U.S.—[U.S. v. Dicks](#), 392 F.2d 524 (4th Cir. 1968).
- 3 U.S.—[U.S. v. Cook](#), 445 F.2d 883 (8th Cir. 1971).
- 4 U.S.—[U.S. v. Cook](#), 445 F.2d 883 (8th Cir. 1971).
- 5 U.S.—[U.S. v. Ronne](#), 414 F.2d 1340 (9th Cir. 1969).
- 6 **Suggestions submitted by applicant**
U.S.—[U.S. v. Wilson](#), 436 F.2d 972 (9th Cir. 1971).
- 7 U.S.—[U.S. v. Wright](#), 474 F.2d 853 (9th Cir. 1973).

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16D C.J.S. Constitutional Law § 2037

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2037. Due process in selective service or draft proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Selective service board proceedings are quasi-judicial and must conform to the basic principles of due process of law.

The composition of a local draft or selective service board must not be such so as to deny a registrant due process of law,¹ but the fact that blacks are under-represented or excluded from a such board does not necessarily deprive a registrant of due process.²

A failure by the selective service to comply with its own regulations is a ground for a finding of denial of due process where prejudice can be shown.³ A procedural irregularity which does not result in prejudice to the registrant is not, however, a denial of due process.⁴ Additionally, the Due Process Clause does not automatically raise procedural regulations for draft boards to the status of constitutional requirements.⁵ A registrant who is, however, actually misled by the acts of the Selective Service System and is thus precluded from exercising a right available to him or her under that system is deprived of due process.⁶ A court will not deem a violation of a regulation, as applied to third persons, a deprivation of due process as to a registrant unless it is apparent that favoritism to another or discrimination against the registrant was intended or unless the violation is so

flagrant and serious that, whether intended or not, concern for fair and efficient administration justifies the sanction of voiding an induction adversely affected by the violation.⁷

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Footnotes

- 1 U.S.—[U.S. v. Dale](#), 304 F. Supp. 1278 (D.N.H. 1969).
- 2 U.S.—[U.S. v. Lemons](#), 480 F.2d 1214 (5th Cir. 1973).
- 3 U.S.—[U.S. v. Hahn](#), 381 F. Supp. 1311 (E.D. Mich. 1974).
- 4 U.S.—[U.S. v. Primous](#), 420 F.2d 33 (7th Cir. 1970).
- 5 U.S.—[U.S. v. Norman](#), 301 F. Supp. 53 (M.D. Tenn. 1968), judgment aff'd, [413 F.2d 789](#) (6th Cir. 1969).
- 6 U.S.—[U.S. v. Jacques](#), 463 F.2d 653 (1st Cir. 1972).
- 7 U.S.—[U.S. v. King](#), 474 F.2d 402 (1st Cir. 1973).

A.L.R. Library

- Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases,
178 A.L.R. Fed. 25.
Sex discrimination in United States Armed Forces, 56 A.L.R. Fed. 850.

16D C.J.S. Constitutional Law § 2038

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2038. Draft board hearing, evidence, and determination

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4246

A registrant asserting a claim before a local draft board is entitled to a fair hearing as a part of due process of law.

A registrant asserting a claim before a local draft board is entitled to a hearing as a part of due process of law, and, where the registrant has been accorded a fair hearing, he or she may not urge the denial of due process in this respect.¹ A registrant is not denied due process by the failure of a local board to inform him or her, in advance, of the purpose of a courtesy hearing or by the board's failure to furnish him or her a copy of the summary of the hearing prepared by the local board clerk.² The denial to a registrant of the right to be represented by counsel also does not constitute a denial of due process of law.³ Additionally, procedural due process is not violated by a draft board's failure to appoint a government appeal agent to advise a registrant on selective service matters where notice is given of the availability and identity of the appeal agent.⁴ The action of a draft board in misleading a registrant as to his or her appeal rights by failing to properly inform the registrant as to the identity of the governmental appeal agent, whose assistance the registrant seeks and desires, does, on the other hand, constitute a denial of due process.⁵

A registrant's evidence in support of his or her claimed classification must be considered thoroughly and without prejudice.⁶ If the classification of a registrant is not warranted by the facts before the board or agency, due process of law is denied.⁷

In some instances, a registrant cannot be denied an opportunity to know and rebut adverse evidence in his or her selective service file before the local draft board and the appeal board, and an authoritative refusal to give him or her that opportunity constitutes a denial of procedural due process.⁸ Thus, the registrant must be furnished with a copy of the recommendation of the Department of Justice that exemption be denied and with an opportunity to reply to such recommendation.⁹ The failure or refusal of the Department of Justice to show a registrant a report of the Federal Bureau of Investigation on his or her claim for exemption as a conscientious objector,¹⁰ or to disclose to the registrant the names and addresses of informants interviewed by the Federal Bureau of Investigation,¹¹ does not, however, violate the principle of due process. Additionally, in some instances, it is deemed sufficient to meet the requirement of due process that a registrant be given an opportunity to obtain a report containing adverse information by requesting it.¹² Where, in such instances, the registrant makes no such request, he or she is not denied due process because a hearing officer fails to inform him or her of the contents of the report.¹³ There is no denial of due process where the material to which a registrant has not been permitted access is not adverse or prejudicial to him or her.¹⁴

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Footnotes

- 1 U.S.—[U.S. v. Dal Santo](#), 205 F.2d 429 (7th Cir. 1953).
- 2 U.S.—[U.S. v. Watson](#), 442 F.2d 1273 (8th Cir. 1971).
- 3 U.S.—[Levine v. Selective Service Local Bd. No. 18, Stamford, Conn.](#), 458 F.2d 1281 (2d Cir. 1972).
- Rationale**
- U.S.—[Cassidy v. U.S.](#), 304 F. Supp. 864 (E.D. Mo. 1969), judgment aff'd, 428 F.2d 585 (8th Cir. 1970).
- No Miranda warnings required**
- U.S.—[Storey v. U.S.](#), 370 F.2d 255 (9th Cir. 1966).
- 4 U.S.—[U.S. v. Rogers](#), 454 F.2d 601 (7th Cir. 1971).
- 5 U.S.—[U.S. v. Fisher](#), 442 F.2d 109 (7th Cir. 1971).
- 6 U.S.—[U.S. v. Peebles](#), 220 F.2d 114 (7th Cir. 1955).
- As to the application of due process to the classification of persons for military service, generally, see §§ 2040 to 2044.
- Opportunity to present information**
- U.S.—[Davis v. U.S.](#), 199 F.2d 689 (6th Cir. 1952).
- 7 U.S.—[In re Schmidt](#), 68 F. Supp. 765 (N.D. Cal. 1946).
- 8 U.S.—[U.S. v. Saunders](#), 467 F.2d 675 (4th Cir. 1972).
- Memorandum**
- U.S.—[Murray v. Blatchford](#), 307 F. Supp. 1038 (D.R.I. 1969).
- FBI report**
- Selective service registrant was denied due process of law where FBI report concerning certain political activities was placed in his or her selective service file and was before appeal board without registrant's knowledge and registrant was afforded no opportunity to explain or contradict the information contained in the report.
- U.S.—[U.S. v. Cabbage](#), 430 F.2d 1037 (6th Cir. 1970).
- 9 U.S.—[Bradley v. U.S.](#), 348 U.S. 967, 75 S. Ct. 532, 99 L. Ed. 754 (1955); [Gonzales v. U.S.](#), 348 U.S. 407, 75 S. Ct. 409, 99 L. Ed. 467 (1955); [Simmons v. U.S.](#), 348 U.S. 397, 75 S. Ct. 397, 99 L. Ed. 453 (1955).
- 10 U.S.—[U.S. v. Nugent](#), 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953).
- 11 U.S.—[Imboden v. U.S.](#), 194 F.2d 508 (6th Cir. 1952).
- 12 U.S.—[Kent v. U.S.](#), 207 F.2d 234 (9th Cir. 1953).
- 13 U.S.—[Kent v. U.S.](#), 207 F.2d 234 (9th Cir. 1953).

Effect that file open to registrant

U.S.—[Gonzales v. U.S.](#), 364 U.S. 59, 80 S. Ct. 1554, 4 L. Ed. 2d 1569 (1960).

U.S.—[U.S. v. Wright](#), 474 F.2d 853 (9th Cir. 1973).

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16D C.J.S. Constitutional Law § 2039

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

a. In General

§ 2039. Due process and military induction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Due process requires that an individual ordered to report for induction be called in the proper order and in strict compliance with pertinent regulations.

Due process requires that an individual ordered to report for induction be called in the proper order and in strict compliance with pertinent regulations.¹ A general ground which may be asserted to avoid conviction for refusal to submit to induction into the armed forces is that there is a denial of due process in local draft board procedures in handling a case.²

A registrant who is deprived of liberty by means of an induction order issued by an unlawfully constituted selective service board is denied due process.³ Where a local draft board fails to afford a registrant due process, its action ordering him or her to report for induction is invalid.⁴ There is also a denial of due process where a local board issues an induction order after failing to determine whether a registrant is entitled to an exemption on the ground of his or her secularly based moral code.⁵

A registrant is not denied due process by the failure of his or her local draft board to notify the registrant of the postponement of his or her induction.⁶ Additionally, a postponement beyond that permissible by regulation of a registrant's induction does not constitute a denial of due process where such delays in the registrant's induction are the result, at least in part, from his or her own actions and are for the registrant's benefit.⁷

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Footnotes

- 1 U.S.—[U.S. v. Johnson](#), 314 F. Supp. 88 (D.N.H. 1970).
- 2 U.S.—[U.S. v. Weaver](#), 336 F. Supp. 558 (E.D. Pa. 1972).
- 3 U.S.—[U.S. v. Williams](#), 317 F. Supp. 1363 (E.D. Pa. 1970).
- 4 U.S.—[U.S. v. Levin](#), 326 F. Supp. 1069 (D. Minn. 1971).
- 5 U.S.—[U.S. v. Rink](#), 430 F.2d 647 (7th Cir. 1970).
- As to the application of due process to deferments and exemptions from military service, generally, see §§ 2034 to 2036.
- 6 U.S.—[U.S. v. Smith](#), 291 F. Supp. 63 (D.N.H. 1968).
- 7 U.S.—[U.S. v. Winer](#), 456 F.2d 566 (3d Cir. 1972).

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16D C.J.S. Constitutional Law § 2040

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2040. Due process in classifying person for military service

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

The classification of persons for military service must be done in accordance with the requirements of due process.

The classification of persons for military service must be done in accordance with the requirements of due process.¹ Abuse of a draft board's discretion in classifying a registrant must be clearly shown before the courts will declare the board's action void as a denial of due process, and where there is any rational basis of fact for the classification, the board's action will be sustained.² The local board's mailing to a registrant of printed forms informing him or her of his or her right to a personal appearance and to appeal a classification conforms to constitutional requirements of due process.³ Additionally, the government's regulatory scheme relating to physical examinations to be given to selective service registrants does not offend due process⁴ though a failure specifically to warn a registrant that his or her refusal to sign a medical history form constitutes a crime, and to tell such registrant of the penalties involved, deprives the registrant of due process.⁵

Footnotes

- 1 U.S.—[U.S. v. Peach](#), 391 F. Supp. 777 (E.D. Wis. 1975).
- 2 U.S.—[Ory v. U.S.](#), 206 F.2d 500 (5th Cir. 1953).
- 3 U.S.—[U.S. v. Seeverts](#), 428 F.2d 467 (8th Cir. 1970).
- 4 U.S.—[U.S. v. Mendoza](#), 295 F. Supp. 673 (E.D. N.Y. 1969).
- 5 U.S.—[U.S. v. Perkins](#), 336 F. Supp. 1104 (D.N.H. 1972).

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16D C.J.S. Constitutional Law § 2041

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2041. Reopening military classification and reclassification

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  4246

Where a draft board, in denying to reconsider a classification, complies with the procedures for reopening a registrant's classification as set forth by applicable regulations, the registrant is not denied due process.

Where a draft board, in denying reconsideration of a classification, complies with the procedures for reopening a registrant's classification, the registrant is not denied due process.¹ If, however, a board fails to follow required administrative procedures, there is a violation of the registrant's due process rights.² A registrant is denied due process by his or her local board where the board fails to afford the registrant the means to adequately present his or her claim for reclassification.³ It is also a denial of due process for a draft board to prevent an administrative appeal from a refusal to reclassify by casting it in the form of a refusal to reopen.⁴

While there is a failure of due process when a draft board fails to consider any fact that might result in the changing of a registrant's classification, the mere fact that a registrant offers some new information does not require that the board reopen

the registrant's classification and consider it anew.⁵ Where, however, a registrant sets out new facts that establish a *prima facie* case for a new classification, a board must reopen his or her classification to determine whether the registrant is entitled to reclassification, and the board's failure to reopen under these circumstances is a denial of due process.⁶ Furthermore, there is a denial of due process of law if the board refuses to reopen a classification even though the registrant has satisfied his or her burden of proof.⁷

Regulations providing that, even where new information is submitted, if the local draft board is of the opinion that such facts, if true, do not justify a change in the registrant's classification, the board does not have to reopen the classification, do not violate due process.⁸ In addition, where a registrant, instead of presenting new facts, reiterates assertions he or she has made previously, it is not a denial of procedural due process for the board to refuse to reopen his or her classification⁹ and to treat the registrant's proffered information as an appeal of his or her original classification.¹⁰

Due process does not require that a registrant's request for reclassification be considered and acted upon before a draft board issues its induction order.¹¹ A registrant is also not denied due process because his or her local draft board, in reviewing the classification of registrants, considers many cases within a short period of time and thus averages a very little time on each case.¹²

Courtesy interview.

A local draft board may grant a courtesy interview to a registrant who requests the reopening of his or her classification, but it is not mandatory that it do so, and the failure to grant such an interview is not a denial of due process.¹³

Notice of reclassification.

The due process requirement that a registrant receive notice of his or her reclassification may be satisfied by actual knowledge from sources other than the receipt of a notice of classification form.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells, and so far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. [U.S. Const. Amend. 14. Duarte Nursery, Inc. v. California Grape Rootstock Improvement Commission](#), 239 Cal. App. 4th 1000, 191 Cal. Rptr. 3d 776 (3d Dist. 2015).

[END OF SUPPLEMENT]

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Footnotes

¹ U.S.—[U.S. v. Hardin](#), 331 F. Supp. 1112 (D. Colo. 1971).

Absence of provision to review

U.S.—[U. S. ex rel. Johnson v. Irby](#), 438 F.2d 114 (5th Cir. 1971).

2 U.S.—[U.S. v. Rundle](#), 413 F.2d 329 (8th Cir. 1969).

Investigation tantamount to reopening

3 U.S.—[U.S. v. Grier](#), 415 F.2d 1098 (4th Cir. 1969).

4 U.S.—[U.S. v. Turner](#), 421 F.2d 1251 (3d Cir. 1970).

5 U.S.—[U. S. ex rel. Miller v. Eberhardt](#), 324 F. Supp. 961 (N.D. Ga. 1971).

6 U.S.—[U.S. v. Prescott](#), 301 F. Supp. 1116 (D.N.H. 1969).

U.S.—[U.S. v. Sanders](#), 470 F.2d 937 (9th Cir. 1972).

Rationale

7 U.S.—[U.S. v. Miller](#), 455 F.2d 358 (9th Cir. 1972).

8 U.S.—[Brede v. Allen](#), 311 F. Supp. 599 (N.D. Ohio 1969).

9 U.S.—[U.S. v. Dicks](#), 392 F.2d 524 (4th Cir. 1968).

10 U.S.—[U.S. v. Smith](#), 465 F.2d 388 (8th Cir. 1972).

11 U.S.—[U.S. v. Brooks](#), 298 F. Supp. 254 (W.D. La. 1969), judgment aff'd, [422 F.2d 365](#) (5th Cir. 1970).

12 As to the application of due process to the reopening of a classification or reclassification after the issuance
13 of an induction order, generally, see § 2042.

Rationale

14 U.S.—[U.S. v. Heigl](#), 455 F.2d 1256 (7th Cir. 1972).

U.S.—[U.S. v. Thorpe](#), 368 F. Supp. 322 (E.D. Wis. 1973).

U.S.—[McLain v. Barstow](#), 337 F. Supp. 1360 (D. Conn. 1971), order aff'd, [455 F.2d 992](#) (2d Cir. 1971).

U.S.—[U.S. v. King](#), 455 F.2d 345 (1st Cir. 1972).

16D C.J.S. Constitutional Law § 2042

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2042. Reopening military classification and reclassification—After issuance of induction order

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4246

Due process is generally not denied under applicable rules and regulations providing that a draft board may not reopen a registrant's classification after the issuance of an induction order without a showing of changed circumstances over which the registrant has no control and resulting in a change in his or her status.

Due process is generally not denied under applicable rules or regulations providing that a draft board may not reopen a registrant's classification after the issuance of an induction order without a showing of changed circumstances over which the registrant has no control and resulting in a change in his or her status.¹ Thus, where the alleged hardship,² or conscientious beliefs,³ for which a registrant seeks the reopening of his or her classification predates the order for his or her induction, the board is not required to reopen the registrant's classification. A board must, however, before denying a registrant's request to reopen such classification filed after the issuance of an induction order, as an element of a registrant's due process rights, at least consider the facts presented in a request to reopen.⁴ A state selective service director may have, by applicable regulation, the power to require a local draft board to reopen and reconsider a classification, regardless of the prior issuance of an induction order,

and due process requires that the director exert such power by exercising his or her own discretion in determining whether to request a local board to reopen a classification.⁵

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Footnotes

- 1 U.S.—[U.S. v. Jercha](#), 458 F.2d 1340 (9th Cir. 1972).
Hearing not required
U.S.—[U.S. v. Al-Majied Muhammad](#), 364 F.2d 223 (4th Cir. 1966).
Necessity for personal interview
U.S.—[U.S. v. Brossard](#), 423 F.2d 711 (9th Cir. 1970).
Subjective misunderstanding of regulations
U.S.—[U.S. v. Kline](#), 354 F. Supp. 931 (M.D. Pa. 1972), aff'd, [474 F.2d 1337](#) (3d Cir. 1972).
2 U.S.—[U. S. ex rel. Johnson v. McBee](#), 311 F. Supp. 531 (N.D. Ill. 1970).
3 U.S.—[U.S. v. Bossi](#), 444 F.2d 121 (9th Cir. 1971).
Late crystallization of beliefs
U.S.—[U.S. v. Stacey](#), 441 F.2d 508 (9th Cir. 1971).
4 U.S.—[U.S. v. Shermeister](#), 425 F.2d 1362 (7th Cir. 1970).
5 U.S.—[U. S. v. Pace](#), 454 F.2d 351 (9th Cir. 1972).

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16D C.J.S. Constitutional Law § 2043

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2043. Administrative review of military classification

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

An appeal board is required to give the appeal of a registrant who is unsuccessful in obtaining a particular classification such consideration as would satisfy due process requirements.

An appeal board is required to give the appeal of a registrant who is unsuccessful in obtaining a particular classification such consideration as would satisfy due process requirements.¹ It is a violation of due process to deny a registrant an appeal from an original classification.²

An appeal board must, before disposing of a registrant's appeal, provide the registrant with a meaningful appeal proceeding, and the failure to do so is a denial of due process.³ A de novo consideration of a registrant's classification by an appeal board does not, however, cure a denial of procedural due process which deprived a registrant of his or her right to a personal appearance before a draft board.⁴

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Footnotes

- 1 U.S.—[U.S. v. Stewart](#), 478 F.2d 106 (2d Cir. 1973).
Due process not denied
U.S.—[Gonzales v. U.S.](#), 364 U.S. 59, 80 S. Ct. 1554, 4 L. Ed. 2d 1569 (1960).
- 2 U.S.—[U.S. v. Davis](#), 460 F.2d 792 (4th Cir. 1972).
- 3 U.S.—[U.S. v. Wallen](#), 315 F. Supp. 459 (D. Minn. 1970).
- 4 U.S.—[U. S. ex rel. Vellrath v. Volatile](#), 308 F. Supp. 1025 (E.D. Pa. 1970).

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16D C.J.S. Constitutional Law § 2044

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Constitutional Law

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

4. Selective Service System and Proceedings

b. Classification of Persons for Service

§ 2044. Judicial review of military classification

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4246

Violations of due process in refusing to reopen and reconsider a classification sufficient to warrant relief in the federal courts may occur either when a local or appellate board denies a registrant valuable procedural rights designed for his or her protection, in violation of applicable statutes or regulations, or when there is no basis of fact for the decision and, therefore, no jurisdiction to assign the classification.

Violations of due process in refusing to reopen and reconsider a classification sufficient to warrant relief in the federal courts may occur either when a local or appellate board denies a registrant valuable procedural rights designed for his or her protection, in violation of applicable statutes or regulations, or when there is no basis of fact for the decision and, therefore, no jurisdiction to assign the classification.¹ A statute providing that no judicial review need be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form, does not, however, deny due process of law.²

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Footnotes

- 1 U.S.—[Kulas v. Laird](#), 315 F. Supp. 345 (E.D. N.Y. 1970).
- 2 U.S.—[Clark v. Gabriel](#), 393 U.S. 256, 89 S. Ct. 424, 21 L. Ed. 2d 418 (1968).

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16D C.J.S. Constitutional Law § 2045

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2045. Termination of military service member, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4243

The termination of a military servicemember must be made in accordance with due process requirements.

A fair and impartial process is essential to the due process rights of military personnel faced with discharge from their military service.¹ The termination of a military servicemember must be made in accordance with due process requirements.² As there is no right to membership in the armed forces, any rational basis for exclusion will satisfy due process requirements so long as it does not violate protected interests.³ Inasmuch as a servicemember has no constitutional entitlement in continued service or employment⁴ or to remain in the service until the end of the term of his or her enlistment, a servicemember is not deprived of life, liberty, or a property interest as result of his or her discharge pursuant to an involuntary reduction in force order.⁵

A servicemember does not have a liberty interest in his or her good name which affords the servicemember due process rights prior to his or her discharge, absent any showing that the stated reason for the discharge is untrue.⁶ Military authorities may not, however, be permitted to return persons to civilian life with an unfair and derogatory characterization of their military service attached without full due process protection.⁷ A stigma, such as that occasioned by a dishonorable discharge of service

member, triggers a right to due process considerations that an honorable discharge does not.⁸ Thus, the imposition of a stigma on a servicemember in connection with his or her discharge from military service is not permitted without affording the servicemember due process in the nature of notice of the charges against him or her and a fair opportunity to present a defense.⁹ To state a claim for deprivation of liberty interest in employment, the plaintiff must show that, in the course of his or her discharge, the military, without notice and an opportunity for plaintiff to be heard, prepared a discharge form which was stigmatizing, false, and published.¹⁰ Where the discharge is honorable and carries no stigma or derogatory connotation, it may be validly accomplished without notice and hearing.¹¹ Thus, an Enlisted Retention Board process that effects a large-scale reduction in the number of enlisted personnel serving in the Navy and results in honorable discharges of service members does not stigmatize those discharged, so as to trigger a right to due process protections, including notice and hearing.¹²

The denial of an officer's unqualified resignation without a hearing does not deprive him or her of life and liberty without due process.¹³ Additionally, a statute denying a promotion or retirement credit for a commissioned military service performed prior to the specified age does not deny due process on the theory that there is no rational basis for treating people differently for purposes of promotion and retirement merely because of age difference.¹⁴ A statute which permits early mandatory retirement of officers under specified conditions is likewise not unconstitutional on the theory that it deprives the officers of a vested property right without due process of law.¹⁵

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Footnotes

- 1 U.S.—[Charlton v. Donley](#), 846 F. Supp. 2d 76 (D.D.C. 2012).
- 2 **Administrative discharge procedure**
U.S.—[Rew v. Ward](#), 402 F. Supp. 331 (D.N.M. 1975).
- 3 U.S.—[Helmich v. Nibert](#), 543 F. Supp. 725 (D. Md. 1982), aff'd, 696 F.2d 990 (4th Cir. 1982).
- 4 **Effect of race-based goals governing early retirement decisions**
U.S.—[Christian v. U.S.](#), 46 Fed. Cl. 793 (2000).
- 5 U.S.—[Wigginton v. Centracchio](#), 205 F.3d 504 (1st Cir. 2000); [Spadone v. McHugh](#), 864 F. Supp. 2d 181, 285 Ed. Law Rep. 272 (D.D.C. 2012).
- 6 U.S.—[Vierrether v. U.S.](#), 27 Fed. Cl. 357 (1992), aff'd, 6 F.3d 786 (Fed. Cir. 1993).
- 7 **A.L.R. Library**
Enlistment or re-enlistment in branches of United States Armed Forces as protected by Federal Constitution or by federal statutes, 64 A.L.R. Fed. 489.
- 8 U.S.—[Guerra v. Scruggs](#), 942 F.2d 270 (4th Cir. 1991).
- 9 **Involuntary separation for substandard performance**
U.S.—[Karr v. Castle](#), 768 F. Supp. 1087 (D. Del. 1991), order aff'd, 22 F.3d 303 (3d Cir. 1994).
- 10 U.S.—[Canonica v. U.S.](#), 41 Fed. Cl. 516 (1998).
- 11 U.S.—[Anderson v. United States](#), 111 Fed. Cl. 572 (2013).
- 12 U.S.—[Phillips v. U.S.](#), 910 F. Supp. 101 (E.D. N.Y. 1996).
- 13 **Due process requirements attach to discharge with stigma attached**
U.S.—[Weaver v. U.S.](#), 46 Fed. Cl. 69 (2000).
- 14 **Compulsory process of civilian witnesses beyond jurisdiction of military not required**
U.S.—[Milas v. U.S.](#), 42 Fed. Cl. 704 (1999), aff'd, 217 F.3d 854 (Fed. Cir. 1999).
- 15 **Stigma must occur in the course of termination**
Statements made by former Air Force employee's supervisors to potential employer regarding employee's separation from Air Force over one year after the employee's termination were too far remote from termination to be considered "in the course of" termination, and thus, due process was not implicated.
U.S.—[Minshew v. Donley](#), 911 F. Supp. 2d 1043 (D. Nev. 2012).
- 16 U.S.—[Flowers v. U.S.](#), 80 Fed. Cl. 201 (2008), aff'd, 321 Fed. Appx. 928 (Fed. Cir. 2008); [Sutton v. U.S.](#), 65 Fed. Cl. 800 (2005).
- 17 U.S.—[Lane v. Secretary of Army](#), 504 F. Supp. 39 (D. Md. 1980), aff'd, 639 F.2d 780 (4th Cir. 1980).

- 12 U.S.—[Allphin v. U.S.](#), 758 F.3d 1336 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 761, 190 L. Ed. 2d 629 (2014); [Anderson v. United States](#), 111 Fed. Cl. 572 (2013).
- 13 U.S.—[Hesse v. Resor](#), 266 F. Supp. 31 (E.D. Mo. 1966).
- 14 U.S.—[Bensing v. U.S.](#), 551 F.2d 262 (10th Cir. 1977).
- 15 U.S.—[Norman v. U. S.](#), 183 Ct. Cl. 41, 392 F.2d 255 (1968) (disapproved of on other grounds by, [Colm v. Kissinger](#), 406 F. Supp. 1250 (D.D.C. 1975)).

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16D C.J.S. Constitutional Law § 2046

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2046. Termination of military reserve member

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4243

An honorable separation of a reservist does not create any procedural due process requirement.

An honorable separation of a reservist does not create any procedural due process requirement.¹ A delinquent reservist is not denied due process when not officially heard on his or her informal request to his or her commanding officer for discharge from the ready reserve because of the reservist's conscientious objection to war and is not given a hearing before the commanding officer certifies the reservist for priority induction as a delinquent reservist.²

Because a heightened deferential review applies to military boards, a finding by the air force board for the correction of military records in a military reservist's administrative discharge hearing that the air force's failure to disclose a letter explaining that an expert witness, who provided evidence regarding the laboratory procedures used in the case, had been removed prior to the hearing from his post as laboratory supervisor due to poor forensic practices, which resulted in a false positive drug test in an unrelated case, is not sufficiently prejudicial to constitute a due process violation.³

A student's interest in avoiding disenrollment from the Reserve Officers Training Corps (R.O.T.C.) is analogous to the interest of a cadet in avoiding expulsion from a military academy so as to warrant equivalent due process protection.⁴ Due process does not require that a student participating in the R.O.T.C. be represented by counsel at a hearing to determine whether he or she be disenrolled.⁵

CUMULATIVE SUPPLEMENT

Cases:

Even assuming, arguendo, that former Navy Junior Reserve Officers' Training Corps (NJROTC) instructor had protected liberty or property interests in his position, he was afforded all the process he was due when he was decertified by Navy; instructor was given notice of Navy's intent to revoke his certification, instructor received evidence against him, instructor was given opportunity to submit rebuttal evidence, and decision was reviewed by certification boards twice. [U.S. Const. Amend. 5. Crooks v. Mabus, 845 F.3d 412 \(D.C. Cir. 2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Helmich v. Nibert, 543 F. Supp. 725 \(D. Md. 1982\)](#), aff'd, [696 F.2d 990 \(4th Cir. 1982\)](#).
Expectancy of benefits
U.S.—[Coppedge v. Marsh, 532 F. Supp. 423 \(D. Kan. 1982\)](#).
No liberty nor a property interest in continued active service
U.S.—[Burns v. U.S., 9 Cl. Ct. 273 \(1985\)](#).
- 2 U.S.—[Quaid v. U.S., 386 F.2d 25 \(10th Cir. 1967\)](#).
As to the application of due process to deferments and exemptions from military service based upon conscientious objector status, generally, see §§ 2035, 2036.
- 3 U.S.—[Williams v. Wynne, 533 F.3d 360 \(5th Cir. 2008\)](#).
- 4 U.S.—[Kolesa v. Lehman, 534 F. Supp. 590, 3 Ed. Law Rep. 577 \(N.D. N.Y. 1982\)](#).
As to the due process rights of service academy cadets in avoiding expulsion from a military academy, generally, see § 2027.
- 5 U.S.—[Kolesa v. Lehman, 534 F. Supp. 590, 3 Ed. Law Rep. 577 \(N.D. N.Y. 1982\)](#).

16D C.J.S. Constitutional Law § 2047

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2047. Discharge for homosexuality

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Law Reviews and Other Periodicals

Developments in the Law: [Progress Where You Might Least Expect It: The Military's Repeal of "Don't Ask, Don't Tell,"](#)
[127 Harv. L. Rev. 1791 \(April 2014\)](#)

The Don't Ask, Don't Tell Repeal Act of 2010 repealed the policy requiring the separation of servicemembers from the armed forces for certain homosexual or bisexual conduct.

The Don't Ask, Don't Tell Repeal Act of 2010¹ repealed the 1993 policy concerning homosexuality in the armed forces. The Act provided in part that a servicemember of the Armed Forces would be separated, with certain exceptions, from the Armed Forces if the member had engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; if the member

had stated that he or she was a homosexual or bisexual, or words to that effect; or if the member had married or attempted to marry a person known to be of the same biological sex.² The Don't Ask, Don't Tell Repeal Act of 2010 was made effective 60 days after the date on which the last of the following occurred: (1) the Secretary of Defense received the report required by the memorandum of the Secretary of Defense; (2) the President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating that: (a) the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action; (b) the Department of Defense has prepared the necessary policies and regulations to exercise the discretion; (c) that the implementation of necessary policies and regulations pursuant to the discretion provided by law is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.³

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Footnotes

1 Pub. L. No. 111-321, §§ 1, 2.

2 10 U.S.C.A. § 654(b).

3 Pub. L. No. 111-321, § 2(b).

A.L.R. Library

[Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct, 96 A.L.R.5th 391.](#)

16D C.J.S. Constitutional Law § 2048

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

5. Resignation, Retirement, Discharge, and Dismissal

§ 2048. In-service conscientious objector status and discharge

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4243

Military regulations with respect to the release or discharge of military personnel on the ground of conscientious objection to military service must comply with standards of fundamental due process.

Military regulations with respect to the release or discharge of military personnel on the ground of conscientious objection to military service must comply with standards of fundamental due process,¹ and where there is such compliance, they do not violate due process.² When regulations prescribe specific steps to be taken with respect to procedures involving discharge as a conscientious objector, they must be substantially followed.³ Failure to follow such procedures constitutes a denial of due process.⁴ The denial of a request for a discharge on the ground of conscientious objection is a denial of due process where such denial has no basis in fact.⁵ Nevertheless, a cadet who applies for discharge from the army as a conscientious objector is not denied due process by the Army Conscientious Objector Board, which denies the cadet's application where the superintendent of West Point does not issue a recommendation on the application until after the investigating officer and commanding officers made their own decisions, and the cadet is permitted to submit a written rebuttal, and documents withheld from the cadet are not relevant to the decision.⁶

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Footnotes

- 1 U.S.—[Finley v. Drew](#), 337 F. Supp. 76 (E.D. Pa. 1972), order aff'd, [455 F.2d 515](#) (3d Cir. 1972).
- 2 U.S.—[Turpin v. Resor](#), 452 F.2d 240 (9th Cir. 1971).
- 3 **Change of duty station**
U.S.—[Switkes v. Laird](#), 316 F. Supp. 358 (S.D. N.Y. 1970).
- 4 U.S.—[Friedberg v. Resor](#), 453 F.2d 935 (2d Cir. 1971).
- 5 **Effect of substantial compliance**
U.S.—[Cole v. Clements](#), 494 F.2d 141 (10th Cir. 1974).
- 6 U.S.—[Friedberg v. Resor](#), 453 F.2d 935 (2d Cir. 1971).
- 7 **Duty to inform**
U.S.—[Epstein v. Commanding Officer](#), 327 F. Supp. 1122 (E.D. Pa. 1971).
- 8 **Access to case file**
U.S.—[Viol i. Reese](#), 343 F. Supp. 462 (E.D. Pa. 1972).
- 9 **Refusal to release after unanimous recommendation**
U.S.—[U. S. ex rel. Tobias v. Laird](#), 413 F.2d 936 (4th Cir. 1969).
- 10 U.S.—[Gann v. Wilson](#), 289 F. Supp. 191 (N.D. Cal. 1968).
- 11 U.S.—[Kanai v. McHugh](#), 638 F.3d 251 (4th Cir. 2011).

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16D C.J.S. Constitutional Law § 2049

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2049. Courts-martial, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  4245(1)

Court-martial proceedings are subject to due process requirements so that an accused before a court-martial is entitled to due process of law.

Court-martial proceedings are subject to due process requirements¹ so that the accused before a court-martial is entitled to due process of law.² To those in the military, the military law is due process.³ What constitutes due process in a trial by a military tribunal is, therefore, gauged by principles of military law exacted by Congress.⁴

A court-martial may constitutionally be empowered to try and punish military offenses.⁵ In the absence of military necessity,⁶ the trial of a civilian by a military court lacking judicial power or jurisdiction constitutes a deprivation of due process of law,⁷ even where the accused is guilty.⁸

Footnotes

- 1 U.S.—[U.S. v. Graf](#), 35 M.J. 450 (C.M.A. 1992).
As to the due process requirements of a court-martial proceeding, generally, see §§ 2051 to 2054.
- 2 U.S.—[U.S. v. Witham](#), 47 M.J. 297 (C.A.A.F. 1997).
Due process does not permit convicting an accused servicemember of an offense with which he has not been charged
U.S.—[U.S. v. Girouard](#), 70 M.J. 5 (C.A.A.F. 2011) (conviction of negligent homicide must be reversed when it is not a lesser included offense to charged offense of murder).
- Comparison with civil courts**
U.S.—[Gallagher v. Quinn](#), 363 F.2d 301 (D.C. Cir. 1966).
- Martial law constitutes due process when duly proclaimed by executive**
U.S.—[Moyer v. Peabody](#), 212 U.S. 78, 29 S. Ct. 235, 53 L. Ed. 410 (1909).
- Protection from injustice**
The constitutional guaranty of due process is meaningful enough, and sufficiently adaptable, to protect soldiers, as well as civilians, from crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding the truth through adherence to those basic guarantees which have long been recognized and honored by military, as well as civil, courts.
U.S.—[Burns v. Wilson](#), 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).
- 3 U.S.—U.S. ex rel. French v. Weeks, 259 U.S. 326, 42 S. Ct. 505, 66 L. Ed. 965 (1922); [Reaves v. Ainsworth](#), 219 U.S. 296, 31 S. Ct. 230, 55 L. Ed. 225 (1911); [Wolf v. Secretary of Defense](#), 399 F. Supp. 446 (M.D. Pa. 1975).
- 4 U.S.—[Dodson v. Zelez](#), 917 F.2d 1250 (10th Cir. 1990).
- Military due process neither source of military law nor natural or common-law concept**
U.S.—[U.S. v. Kelly](#), 41 M.J. 833 (N.M.C.C.A. 1995), decision set aside on other grounds, 45 M.J. 259 (C.A.A.F. 1996).
- Judicial deference to power of Congress regarding military affairs**
U.S.—[Sanford v. U.S.](#), 567 F. Supp. 2d 114 (D.D.C. 2008), aff'd, 586 F.3d 28 (D.C. Cir. 2009).
- 5 N.Y.—[People ex rel. Underwood v. Daniell](#), 50 N.Y. 274, 1872 WL 10008 (1872).
- Offenses committed during imprisonment**
Exercise of the power, long established and recognized, to try military prisoners by courts-martial for offenses committed during the imprisonment does not violate the Fifth Amendment.
U.S.—[Kahn v. Anderson](#), 255 U.S. 1, 41 S. Ct. 224, 65 L. Ed. 469 (1921).
- 6 U.S.—[Ex parte White](#), 66 F. Supp. 982 (Terr. Haw. 1944).
- 7 U.S.—[Ex parte Spurlock](#), 66 F. Supp. 997 (Terr. Haw. 1944).
- 8 U.S.—[Ex parte White](#), 66 F. Supp. 982 (Terr. Haw. 1944).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2050. Summary courts-martial

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4245(1)

Military personnel who are due to appear before a summary court-martial may be subjected to a loss of liberty or property and, consequently, are entitled to due process of law.

Military personnel who are due to appear before a summary court-martial may be subjected to a loss of liberty or property and, consequently, are entitled to due process of law.¹ The Due Process Clause of the Fifth Amendment² does not, however, require that counsel be provided to an accused in a summary court-martial proceeding.³ Moreover, the fact that the accused, in order to avail himself or herself of the right to counsel, is required to refuse summary court-martial and accept a special court-martial, and, in doing so, exposes himself or herself to the possibility of a more severe punishment than can be imposed at a summary court-martial, does not deny the accused his or her due process rights.⁴

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Footnotes

¹ U.S.—[Middendorf v. Henry](#), 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).

- 2 U.S. Const. Amend. V.
3 U.S.—[Middendorf v. Henry](#), 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).
4 U.S.—[Middendorf v. Henry](#), 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).

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16D C.J.S. Constitutional Law § 2051

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2051. Application of due process to court-martial proceedings, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4245(2)

Although the specific guaranties of the Fifth Amendment relating to criminal prosecutions may not be invoked in instances arising in the armed forces of the United States, an accused before a court-martial is entitled to a fair trial within due process of law concepts.

Although the specific guaranties of the Fifth Amendment¹ relating to criminal prosecutions may not be invoked in instances arising in the armed forces of the United States,² an accused before a court-martial is entitled to a fair trial within due process of law concepts.³ Indeed, in discussing due process in a court-martial proceeding, the Armed Forces Court of Appeals has applied the concepts of due process as to the right of the accused service member to be informed of the nature and cause of the accusation and his or her right to receive fair notice of what he or she is being charged with.⁴ Due process does not require that military courts-martial mirror criminal trials⁵ but does, rather, guarantee to servicemembers that military procedure will be applied to them in a fundamentally fair way.⁶

Generally, the accused must be given due notice of the charge against him or her⁷ and fair notice as to the conduct punishable.⁸ The accused also, generally, has a right to counsel, at least where there is a general or special court-martial.⁹ Also, the right to the expert assistance of a mitigation specialist in a capital case is determined on a case-by-case basis.¹⁰ Moreover, the accused must be given a fair opportunity to prepare his or her defense.¹¹ Additionally, the accused has the right to have his or her guilt properly adjudicated¹² by a competent tribunal.¹³

A basic right of military due process is also the right to a judge who appears impartial throughout an accused's court-martial.¹⁴ The lack of a fixed term of office for military judges does not violate the Due Process Clause.¹⁵ In order for an appellant to state a due process claim that a military judge was biased, the appellant must show either that actual bias existed or that an appearance of bias created a conclusive presumption of actual bias.¹⁶

The fact that the same officer who recommends defendant for a court-martial also approves the conviction and sentence does not deny due process to a defendant.¹⁷ Similarly, provisions assigning multiple roles to the convening authority in the initiation, prosecution, and review of courts-martial does not deny the accused due process of law.¹⁸

Prosecution in civilian court of discharged servicemember.

Prosecution of a defendant who was discharged from the Army in the civilian justice system under the Military Extraterritorial Jurisdiction Act¹⁹ for crimes committed while deployed overseas as infantry in the Army does not violate the Due Process Clause where the defendant is discharged before Army officials became aware of his involvement in the offense, and thus, his discharge and prosecution in civilian court does not shock the conscience or interfere with rights implicit in the concept of ordered liberty.²⁰

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Footnotes

1 U.S. Const. Amend. V.

2 U.S.—*In re Wrublewski*, 71 F. Supp. 143 (N.D. Cal. 1947), judgment aff'd, 166 F.2d 243 (C.C.A. 9th Cir. 1948).

3 U.S.—*Burns v. Lovett*, 202 F.2d 335 (D.C. Cir. 1952), judgment aff'd, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

4 U.S.—*U.S. v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

5 U.S.—*Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 151 Ed. Law Rep. 743 (10th Cir. 2001).

6 U.S.—*White v. Humphrey*, 212 F.2d 503 (3d Cir. 1954).

7 **Notice of charges fundamental right of due process**

U.S.—*Henry v. Department of Navy*, 886 F. Supp. 686 (E.D. Ark. 1995), judgment rev'd on other grounds, 77 F.3d 271 (8th Cir. 1996).

8 U.S.—*U.S. v. Merritt*, 72 M.J. 483 (C.A.A.F. 2013).

Possible sources of "fair notice" that conduct is subject to criminal sanction include federal law, state law, military case law, military custom and usage, and military regulations

U.S.—*U.S. v. Warner*, 73 M.J. 1 (C.A.A.F. 2013); *U.S. v. Pope*, 63 M.J. 68 (C.A.A.F. 2006) (fair notice of sexual harassment standards established); *United States v. Caporale*, 73 M.J. 501 (A.F.C.C.A. 2013).

Other possible sources of fair notice include training and other materials that give context to regulations and explain the differences between permissible and impermissible behavior

U.S.—*United States v. Caporale*, 73 M.J. 501 (A.F.C.C.A. 2013).

Objective, clearly understood standards of criminality required

U.S.—*U.S. v. Cochrane*, 60 M.J. 632 (N.M.C.C.A. 2004).

- 9 U.S.—[Middendorf v. Henry](#), 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976).
As to the right to counsel in a summary court-martial proceeding, generally, see § 2050.
- 10 **Qualifications**
U.S.—[Angle v. Laird](#), 429 F.2d 892 (10th Cir. 1970).
- 11 U.S.—[U.S. v. Kreutzer](#), 61 M.J. 293 (C.A.A.F. 2005).
- 12 **Meaningful opportunity to present a complete defense**
U.S.—[U.S. v. Mahoney](#), 58 M.J. 346 (C.A.A.F. 2003).
- 13 **Accused must be given basic tools necessary to present defense**
U.S.—[U.S. v. Short](#), 50 M.J. 370 (C.A.A.F. 1999).
- 14 **Propriety of conviction by concurrence of only two thirds of voting members of panel**
U.S.—[Mendrano v. Smith](#), 797 F.2d 1538 (10th Cir. 1986).
- 15 U.S.—[Fly v. U.S.](#), 120 Ct. Cl. 482, 100 F. Supp. 440 (1951).
- 16 **Constitutional, as well as regulatory, right to fair and impartial panel**
U.S.—[U.S. v. Downing](#), 56 M.J. 419 (C.A.A.F. 2002).
- 17 U.S.—[U.S. v. Sowders](#), 53 M.J. 542 (N.M.C.C.A. 2000).
- 18 U.S.—[Weiss v. U.S.](#), 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).
- 19 U.S.—[U.S. v. Barnes](#), 60 M.J. 950 (N.M.C.C.A. 2005).
- 20 U.S.—[Gross v. U. S.](#), 209 Ct. Cl. 70, 531 F.2d 482 (1976).
- U.S.—[Curry v. Secretary of Army](#), 439 F. Supp. 261 (D.D.C. 1977), judgment aff'd, 595 F.2d 873 (D.C. Cir. 1979).
- Recommendation for trial and review of proceedings**
U.S.—[Flackman v. Hunter](#), 75 F. Supp. 871 (D. Kan. 1948).
- 18 U.S.C.A. § 3261.
- 20 U.S.—[U.S. v. Green](#), 654 F.3d 637 (6th Cir. 2011).

16D C.J.S. Constitutional Law § 2052

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2052. Timeliness of filing charges against military servicemember

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4245(2)

Prejudice to an accused subject to military law is only one prong of a due process speedy trial claim, as there must also be an examination of the reason for the delay, but the prosecution is not required to file charges as soon as probable cause exists.

Prejudice to an accused subject to military law is only one prong of a due process speedy trial claim, as there must also be an examination of the reason for the delay, but the prosecution is not required to file charges as soon as probable cause exists.¹ There may, however, be a due process violation when delay prior to the initiation of charges is incurred in reckless disregard of circumstances known to the prosecution, suggesting that there exists an appreciable risk that such delay will impair the ability of the accused to mount an effective defense.²

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Footnotes

¹ U.S.—[U.S. v. Reed](#), 41 M.J. 449 (C.A.A.F. 1995).

2 U.S.—[U.S. v. Sills, 56 M.J. 556 \(A.F.C.C.A. 2001\)](#), decision set aside on other grounds, [56 M.J. 239 \(C.A.A.F. 2002\)](#).

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2053. Necessity of preliminary hearing under military law

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, Constitutional Law  4245(2)

A preliminary hearing before the trial of a person subject to military law is not necessary for purposes of due process of law since the Federal Constitution expressly exempts courts-martial from the necessity of indictment by the grand jury.

A preliminary hearing before the trial of a person subject to military law is not necessary for purposes of due process of law¹ since the Federal Constitution expressly exempts courts-martial from the necessity of indictment by the grand jury.² Accordingly, a trial of a person subject to military law before a general court-martial, without any preliminary investigation as required, does not deny to the accused due process of law.³ Where, however, a preliminary hearing before trial by court-martial is held, it must meet all the elements essential to due process in that feature of the proceedings.⁴

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Footnotes

¹ U.S.—[Becker v. Webster](#), 171 F.2d 762 (2d Cir. 1949).
Necessity of evidentiary hearing

U.S.—[Porter v. Richardson](#), 403 F. Supp. 663 (D. C.Z. 1975).

2 U.S.—[Betonie v. Sizemore](#), 496 F.2d 1001 (5th Cir. 1974).

3 U.S.—[Becker v. Webster](#), 171 F.2d 762 (2d Cir. 1949).

4 U.S.—[Talbott v. U.S. ex rel. Toth](#), 215 F.2d 22 (D.C. Cir. 1954), judgment rev'd on other grounds, [350 U.S. 11](#), [76 S. Ct. 1](#), [100 L. Ed. 8](#) (1955).

Cross-examination of witnesses

U.S.—[De War v. Hunter](#), 170 F.2d 993 (10th Cir. 1948).

16D C.J.S. Constitutional Law § 2054

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PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

A. Armed Services

6. Courts-Martial

§ 2054. Conviction and review of court-martial conviction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4245(3), 4245(4)

Military personnel, who have been convicted by a court-martial, may be subjected to a loss of liberty or property and are, consequently, entitled to due process of law with regard to sentencing and review of court-martial proceedings.

Military personnel, who have been convicted by a court-martial, may be subjected to loss of liberty or property and are, consequently, entitled to the due process of law.¹ Review of courts-martial proceedings must also be in accordance with due process of law.² Thus, an appellate court may not affirm an included offense on a theory not presented to the trier of fact, as to do so would offend the most basic notions of due process, in that such action violates an accused's right to be heard on the specific charges of which he or she is accused.³

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Footnotes

¹ U.S.—[Middendorf v. Henry](#), 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976); [Curry v. Secretary of Army](#), 595 F.2d 873 (D.C. Cir. 1979).

Sentence

U.S.—[Allen v. VanCantfort](#), 436 F.2d 625 (1st Cir. 1971).

Factors for evaluating if posttrial delay violates accused's due process rights

U.S.—[United States v. Bischoff](#), 2015 WL 894476 (A.F.C.C.A. 2015).

2

Right to timely review

U.S.—[Diaz v. Judge Advocate General of the Navy](#), 59 M.J. 34 (C.A.A.F. 2003).

3

U.S.—[U.S. v. Riley](#), 50 M.J. 410 (C.A.A.F. 1999).

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